Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

October Term, 1988

William H. Wade, *Petitioner*

V.

Tommy Goodwin, *Director of Arkansas State Police*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

On an appeal to the Eighth Circuit Court of Appeals the Petitioner argued that the United States District Court for the Eastern District of Arkansas erred when his case was dismissed on a motion of the Respondent for a Summary Judgment.

The question presented for review is whether it is proper for the Eighth Circuit Court of Appeals to consider significant facts from extrajudicial sources when those significant facts are not part of the record.

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No.———

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PETITION FOR WRIT OF CERTIORARI

The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William H. Wade, the petitioner herein, prays, that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered in the above-entitled case on April 8, 1988, and on May 18, 1988.

OPINION BELOW

The unreported opinion of the Eighth Circuit Court of Appeals is printed in the Appendix hereto, infra, page A-1, together with its order denying a rehearing to the Petitioner, infra, page A-8.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1988. On May 18, 1988, the Court of Appeals entered an order denying Petitioner's petition for a rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

UNITED STATES SUPREME COURT RULES INVOLVED

Rule 17 (a) of the United States Supreme Court states in part that when a federal court of appeals. . . . "has so far departed from the accepted and usual course of judicial proceedings". . . . that a writ of certiorari may issue.

STATEMENT OF THE CASE

Wade originally sued the Respondent (Director of the Arkansas State Police) who had (while acting under color of law) wrongfully and maliciously included Wade's name in a list of "survivalist" and who had indicated in writing that some of the "survivalists" were murderers, racketeers, counterfeiters and members of such groups as the White American Bastion, Aryan Nations, Ku Klux Klan, the Order and the Covenant, Sword and Arm of the Lord. The Respondent gave the list and the written information complained of to the Associated Press which resulted in unfavorable articles being written in many newspapers in Arkansas all of which damaged Wade.

Wade, therefore, brought suit for injunctive relief and damages under the Civil Rights Act of April, 20, 1871, 17 Stat. 3 (42 U.S.C. Sec 1983) wherein he alleged that he was not a "survivalist" and that he had not committed any of the crimes or been a member of any of the organizations described by the Respondent in the written information that he gave to the Associated Press.

After a summary judgment was granted to the Respondent, Wade appealed to the Eighth Circuit Court of Appeals.

In the opinion of April 8, 1988 (which was adverse to Wade), the Eighth Circuit Court of Appeals, in footnote on page 2 of the opinion, referred to a "subsequent indictment of Wade" for alleged implication of Wade in a plot to assassinate a United States District Court Judge. The Eighth Circuit again noted a "subsequent indictment" of Wade on page 6 of its opinion.

Other than the two instances described in the preceeding paragraph, there is no mention anywhere in the record (pleadings or oral arguments) that Wade had been indicted.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO CORRECT THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The specific question presented for review is whether it is proper for the Eighth Circuit Court of Appeals to consider significant facts or evidence that was obtained from extrajudicial sources where those facts or evidence are not part of the record.

The Seventh Circuit Court of Appeals in the case of Peacock Records, Inc. v. Checker Records, Inc., 430 F. 2d 85 (1970), held on page 89 that:

> "Findings by a trial judge unsupported by the record are evidence that the trial judge has relied on extrajudicial sources in making such determinations indicating personal bias and prejudice."

The Court, in Peacock, had previously stated that such opinions must be based on direct evidence introduced in the proceedings and not based on mere speculation unsupported by the record.

ARGUMENT

The indictment of William H. Wade for his alleged involvment in a plot to assassinate a United States Federal Court Judge had to be highly inflamatory to the Eighth Circuit. The Eighth Circuit had to be prejudiced and biased. Therefore, the knowledge of this fact gained from extrajudicial sources (totally unsupported in any way by the record before the Eighth Circuit) clearly must indicate a prejudiced, biased, and inflamed attitude on the part of the Eighth Circuit.

Once the bell is rung it cannot be unrung. The only proper way to handle this case is to direct another United States District court to consider the original appeal from the United States District Court for the Eastern District of Arkansas.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2479

William H. Wade, Appellant, V. Tommy Goodwin, Director of Arkansas State Police, Appellee	•	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: November 9, 1987
Filed: April 8, 1988

Before JOHN R. GIBSON, Circuit Judge, HENLEY, Senior Circuit Judge, and FAGG, Circuit Judge.

HENLEY, Senior Circuit Judge.

William H. Wade appeals from the district court's[1] grant of Arkansas State Police Director Tommy Goodwin's motion for summary judgment based on Wade's failure to state a claim in his 42 U.S.C. § 1983 suit. We affirm.

[1]The Honorable George Howard, Jr., United States District Judge, Eastern District of Arkansas.

In 1985 at the request of the governor of Arkansas, Goodwin compiled a list of persons identified as "survivalists."[2] This "list" was to be circulated to Arkansas state troopers for the purpose of identifying persons who possibly posed threats to law enforcement personnel on public highways. The resulting "survivalist list" included Wade's name. Subsequently, members of the news media filed a Freedom of Information request with the state police asking for a copy of the "survivalist list." Goodwin sought and received a legal opinion from the state's attorney general on the legality of releasing the information. After reviewing the attorney general's opinion and the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-101 et seq. (AFOIA), Goodwin released the requested information to the news media.[3] The list was subsequently published in several local and state newspapers.

Wade's complaint alleged that the compilation and publication by the Arkansas state police of the list containing his name deprived him of his constitutional rights. He asserted claims of slander, denial of due process and equal protection, invasion of privacy, and a chilling effect on the exercise of his first amendment rights of speech and association. Wade sought damages and injunctive relief. Goodwin moved for summary judgment asserting that Wade had failed to state a § 1983 claim as there had been no deprivation of constitutional rights. In the alternative, Goodwin argued that he was entitled to qualified immunity from suit in both his official and individual capacities.

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[2]The term "survivalist" was used by the state authorities to include members of the Ku Klux Klan; the Covenant, Sword and Arm of the Lord (C.S.A.); The Order; Aryan Nations; and the Posse Commitatus. It was believed that these groups advocated violence and that they posed a threat to law enforcement personnel.

[3]The Arkansas attorney general evidently advised defendant that if the "survivalist list" was not the product of an ongoing investigation of suspected criminal activity, it could be released. See Ark. Code Ann. § 25-19-105 (b) (6).

In light of subsequent indictment of Wade for alleged implication in a plot to assassinate a United States District Judge and an agent of the Federal Bureau of Investigation, one may wonder about the extent of defendant's information as well as the legislative wisdom in phrasing exemptions to the AFOIA.

The district court in granting summary judgment concluded that the gathering of the information for use by state troopers while in the field was permissible. The court stated that Wade had failed to allege or show any objective chill on his first amendment rights, and that the "list" was not released to the press voluntarily but pursuant to a Freedom of Information request based on Arkansas statutes. Further, the court ruled that Goodwin would be entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982).

In order to survive a motion for summary judgment on his 42 U.S.C. § 1983 claim, Wade had to raise a genuine issue of material fact whether (1) Goodwin acted under color of state law, and (2) Goodwin's conduct deprived Wade of a constitutional or federal right. Fed. R. Civ. P. 56(c); see Watertown Equipment Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1489 (8th Cir. 1987). While we accept the conclusion that Goodwin, in compiling and releasing the information, was acting under color of state law, we do not believe that these actions resulted in Wade being denied any constitutional rights.

Wade initially claimed that Goodwin had no right to compile the "survivalist list," and consequently that Goodwin had chilled Wade's first amendment rights to speech and association by including his name on the list. However, allegations that the existence of government investigatory information is a violation of first amendment rights will not constitute a § 1983 claim unless there is also an allegation of some specific injury resulting therefrom. Laird v. Tatum, 408 U.S. 1, 10-14 (1972). A review of the record reveals that Wade has pleaded general harm to his reputation and that as a result of this harm he will be unable in the future to find employment or obtain credit. Alleging speculative apprehensiveness as to future misuse of information resulting in direct harm is a subjective claim and "[a]llegations of a subjective 'chill' are not an adequate substitute for claim of specific present objective harm or a threat of specific future harm." Id. at 13-14. Consequently, we find that Wade has not sufficiently established a genuine issue of whether a first amendment injury resulted from the compilation of the list.

Wade claimed that his equal protection rights would be violated because he would be subjected to selective surveillance, arrest, or prosecution because his name was on the list. Without allegations of invidiously dissimilar treatment there is no basis for an equal protection claim. Peck v. Hoff, 660 F.2d 371, 373 (8th Cir. 1981) (per curiam). Wade failed to allege that he or a class to which he belongs actually received treatment from the state police which was invidiously dissimilar to that received by other persons. Thus, we also find Wade's equal protection claim deficient.

Wade next asserts that even if the compilation of the list was constitutionally permissible, the state's wrongful inclusion of his name on the publicized "survivalist list" had ruined his reputation and had consequently deprived him of property and liberty rights without due process of law. Wade's allegations, beyond general harm to reputation, were that "he will find it impossible to make a living or obtain loans or credit." These allegations do not state a § 1983 claim. One's reputation alone is neither a "liberty" nor a "property" interest protectible by the due process clause of the fourteenth amendment. Paul V. Davis, 424 U.S. 693, 701-10 (1976) (injury to reputation resulting from the appearance of name and photograph on flyer captioned "active shoplifters" which was distributed by state police is not an injury protected by the due process clause). Wade's claims of injury to his ability to make a living and obtain loans and credit, even if true, do not implicate any action by the State of Arkansas beyond the general injury to his reputation. Any such injury could arise only through the acts of private individuals as a result of Wade's claimed reputational impairment.

However, a due process violation may exist if the complained of state action deprives the stigmatized party of a right previously held under state law. American Family Life Assur. Co. v. Teasdale, 733 F.2d 559, 565 (8th Cir. 1984) (press release critical of cancer insurance did not deprive an insurance company of its state-created right to sell cancer policies), citing Paul v. Davis, 424 U.S. at 708; see also Morton v. Becker, 793 F.2d at 187-88. We believe that the injuries described by Wade are precisely the kinds of injuries which the Supreme Court believed were protected against by state tort law rather than by

the due process clause of the fourteenth amendment, Paul v. Davis, 424 U. S. at 711-12. It may be that in some circumstances the ability to obtain employment is a protectible property interest. See Morfeld v. Kehm, 803 F.2d 1452, 1453-54 (8th Cir. 1986). Morfeld depends on Perry v. Sindeman 408 U.S. 593 (1972), for its general language that a right to employment is a protectible property interest. Perry, however, describes this future employment property interest as a right to employment which arises from rules, mutually explicit understandings, or implications from surrounding circumstances which would support a claim of job entitlement. Id. at 601-02. Wade has made no such claims, nor could he, as the defendant is not his employer. Consequently, under the "change in legal status" test we described in American Family Life Assur. Co., 733 F.2d at 565, we do not believe that Wade has stated a due process violation based on a deprivation of a state-created right.

Likewise Wade's claim that publication of the list was a violation of his privacy rights is legally insufficient to withstand attack by motion for summary judgment. The constitutional right to privacy is generally limited to only the most intimate aspects of human affairs. McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76-77 (8th Cir.), cert. denied, 429 U.S. 855 (1976); see also Klein Independent School District v. Mattox, 830 F.2d 576, 580 (5th Cir. 1987). This is not to say that the Constitution does not protect rights of people to associate together and to advocate and promote legitimate, albeit controversial, political or social action. NAACP v. Alabama, 357 U.S. 449 (1958); Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark.), aff'd, 393 U.S. 14 (1968) (per curiam). But on balance freedom from publication by police of associations and lists has found little constitutional support in specific cases in the absence of very substantial restraint on first amendment rights. See NAACP, 357 U. S. at 462. Indeed, publication by the police of untrue criminal charges has been found not to be an invasion of privacy which rises to the level of a constitutional violation. McNally, 532 F.2d at 77 n.9 (citing Baker v. Howard, 419 F.2d 376 (9th Cir. 1969)).

Appellant's brief relates that Wade's family has been cited as "State Farm Family of the Year" and that he has been active in a veterans' association and has held prominent community positions. He denies that he has ever belonged to any of the so-called "survivalist" groups or ever been charged with a violent crime. Since on the record before us there is no showing that Wade is a "survivalist" or a person given to violence, we certainly reach no factual conclusion adverse to Wade. Nor do we here draw any adverse inference from the noted indictment of Wade. So far as the case at bar is concerned, Wade stands clothed with a presumption of innocence.

At argument Wade candidly conceded that it was highly doubtful, if not impossible, to prove any real damages as a result of the compilation or publication of the "list," and counsel stated that primarily Wade wanted a "name clearing" hearing. Wade evidently believes that a "good name is rather to be chosen than great riches, and loving favor rather than silver and gold." Proverbs Ch. 22, verse 1. Perhaps unfortunately, neither this court nor the district court has jurisdiction under § 1983 to give Wade a name-clearing hearing. At bottom, his complaint alleges, if any cause, a state tort action for defamation of character. Thus, we have no choice other than to deny relief here.[4]

From what has been said, it follows that, without prejudice to any state cause of action Wade may seek to pursue, the judgment of the district court now under attack should be, and it is, affirmed.

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[4]In view of the nature of our disposition of this case, it is unnecessary to pass upon appellee's claim of qualified immunity or upon appellant's motion for leave to enlarge the record on appeal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2479EA

William H. Wade, Appellant, V. Tommy Goodwin, Director of Arkansas State Police, Appellee	*	Appeal from the United States District Court for the Eastern District of Arkansas.

Appellant's petition for rehearing has been considered by the Court and is denied.

May 18, 1988

Order entered at the Direction of the Court:

Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

WILLIAM H. WADE
PLAINTIFF

No. J-C-85-226

V.

TOMMY GOODWIN, Director of
Arkansas State Police
DEFENDANT

ORDER

Plaintiff filed suit on July 29, 1985, under 42 U.S.C. §1983 alleging that defendant, acting in his official capacity, directed the Arkansas State Police to compile a list of persons identified as "survivalists" which was published and distributed to police officers; that at the Associated Press' (AP) request, it was permitted access to the list; that on July 3, 1985, several newspapers published thirty-three (33) names from the list indicating that some of the persons on the list were robbers, some murderers, some racketeers, some counterfeiters, and many belonged to named organizations; plaintiff's name, age, birthplace and residence were included in the list; that the list without defining "survivalist" implies that the terms is associated with violent criminal activity and membership in radical or unpopular organizations; that he has never been charged with any crimes or been a member of the listed groups or stored unusual amounts of food or provisions; and that these acts by defendant slandered him, deprived him of due process, equal protection and privacy and had a chilling effect on his First Amendment rights to free speech and association.

By order filed on November 29, 1985, the Court granted in part and denied in part defendant's motion to dismiss. The damages claim against defendant in his official capacity was dismissed. On December 31, 1985, plaintiff filed an amended complaint realleging the facts in the original complaint plus allegations that defendant in his individual capacity acted with gross and reckless disregard to plaintiff's rights and that he knew or should have known that the actions he was taking would violate plaintiff's constitutional rights. He prays for an injunction from further unwarranted invasion of his right to equal protection

and privacy and damages.

On July 23, 1986, defendant filed a motion for summary judgment on the grounds that the compilation and dissemination of the manual to troopers and the release of the manual to the AP fail to state claims upon which relief can be granted. In the alternative, he pleads that he is entitled to qualified immunity concerning all of the allegations since his actions were discretionary and did not violate any clearly established rights which any reasonable person would have known. In support of the motion, defendant submitted a brief, his affidavit and a statement of material facts in conformity with the provisions of Local Rule 29.

Defendant avers that at the request of the Governor, he asked his personnel to compile a list of various persons who were members of the Ku Klux Klan; the Covenant, Sword and the Arm of the Lord; the Order; Aryan Nations; and the Posse Commitatus; that at the time this list was prepared it was well known to law enforcement agencies and the public that those groups advocated violence as a means to achieve their objectives; that if they were stopped by law enforcement personnel for even minor traffic violations, there was a greater risk that they would resist arrest by violent confrontation or flight; that he disseminated the list of "survivalists" to his troopers for the purpose of identifying those group members so that the troopers would proceed with greater caution when carrying out their normal duties if they stopped any of the listed individuals; that a request from the AP was received to review the manual; that he asked the Attorney General's (AG) office for an opinion on whether the manual was open to the public; the opinion stated that if the manual were not the product of an on-going investigation of suspected criminal activity, then it was not an exception to the Freedom of Information Act (FOIA); that the manual was compiled from information which the Arkansas State Police (ASP) obtained from other law enforcement agencies and public records concerning membership in those groups; that the manual was not a product of surviellance nor an on-going investigation of suspected criminal activity; that he believed in good faith after reviewing how the manual was assembled and the information therein that the manual was not excepted under the FOIA and so the AP was allowed to review the contents.

The statement of uncontested material facts lists that defendant is Director of the ASP; that he in that capacity instructed his

personnel to prepare a manual which contained a list of persons known as "survivalists"; that the manual was distributed to all ASP officers in the field; that the AP made a request under the FOIA to review the manual; that defendant requested an opinion from the AG on whether the manual was open to the public; that after reviewing the exceptions to the FOIA and the opinion, defendant allowed the AP to review the manual; and that on July 3, 1985, several newspapers published thirty-three (33) names from the list which included plaintiff's name, age, birthplace and residence.

On September 10, 1986, plaintiff filed a response and supporting brief to the summary judgment motion. He contends that the defendant violated clearly established rights since the plaintiff has a right not to be slandered by public officials acting in an official capacity, that he has a right to privacy, that he has a right not to be wrongfully blacklisted and so qualified immunity is not available.

Local Rule 29 provides that a party moving for summary judgment must file a separate statement of the material facts as to which it contends that there is no genuine issue to be tried, the non-moving party in addition to its response must file a statement of facts as to which it contends there is a genuine issue to be tried, and that all material facts set forth in the moving party's statement shall be deemed admitted unless controverted by a statement from the non-moving party.

When this Court was faced with defendant's motion to dismiss on November 29th for failure to state facts upon which relief could be granted, the Court found the question to be close when Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318 (1972) was considered at that stage of the proceedings. In resolving the motion to dismiss, the Court had to construe the allegations in the complaint and the inferences flowing therefrom in the light most favorable to the plaintiff. However, a different situation is presented by a properly supported motion for summary judgment. Here, defendant has submitted the required Rule 29 statement of uncontested material facts which are based on his affidavit. This affidavit also contains other statements which have not been controverted. Thus, the record has been sufficiently developed for a determination of whether plaintiff has stated a claim upon which relief can be granted.

The Court has applied the standards for review of motions for summary judgment outlined in Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986) and Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986).

When these standards and the undisputed facts are applied to the holding in Laird, the Court finds that plaintiff has failed to state a claim upon which relief can be granted. The evidence reveals that in response to violent confrontations with members of certain organizations, defendant was asked to compile a list of known members in order to inform his troopers so they could proceed with greater caution when they encountered these individuals during their routine stops. As a result of information obtained from other law enforcement agencies and public records concerning membership in these groups, a manual was assembled and disseminated to defendant's troopers in the field. While the record is unclear as to how the AP learned of the existence of this list, the facts show that when a request by the AP was made for the disclosure, defendant sought an opinion from the AG as to whether the contents were covered by the FOIA. Based upon the AG's opinion as to the applicability of the exceptions to the manual, defendant allowed the AP to review the contents. Several newspapers then published plaintiff's name, age, birthplace and residence, called him a "survivalist" and apparently noted that others on the list had been involved in criminal activity or belonged to certain named organizations.

The gathering of the limited information on plaintiff from law enforcement agencies and public records for the purpose of identifying for troopers in the field individuals who may have either a violent reaction or a flight reaction to a routine stop is permissible under Laird and does not constitute a justiciable controversy. See also, Gordon v. Warren Consolidated Board of Education, 706 F.2d 778 (6th Cir. 1983); Philadelphia Yearly meeting of the Religious Soc of Friends v. Tate, 519 F. 2d 1335 (3rd Cir. 1975). An excellent review of the ramifications of Laird as to whether certain activities are justiciable or objectively chilled First Amendment rights is found in Alliance to End Repression v. City of Chicago, 627 F. Supp. 1044 (N.D. Ill. 1985). Here, the record reflects defendant's actions were within the bounds of permissible intelligence-gathering for a proper purpose and plaintiff failed to allege, much less, show any objective chill. Although the information on plaintiff was ultimately revealed to the press, the disclosure is in sharp contrast to situations in Philadelphia and Alliance where the officials voluntarily disclosed the information to the press. Defendant released the contents only after seeking legal advice on the FOIA and reviewing the provisions of that Act and believing that the manual was not excepted from the Act's mandatory disclosure.

Plaintiff's theory of defamation does not rise to the level of a violation of equal protection or due process under the Fourteenth

Amendment. More must be involved than simple defamation by a state official. Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976). Mere injury to reputation alone does not constitute a violation. Karr v. Townsend, 606 F. Supp 1121 (W.D. Ark. 1985). "(T) he offending state action . . . must deprive the stigmatized party of a right to a benefit previously held under state law." American Family Life Assur Co v. Teasdale, 733 F. 2d 559, 656 (8th Cir. 1984).

Finally, defendant would be entitled to qualified immunity from liability for damages since he was performing discretionary functions which did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U. S. 800, 102 S. Ct. 2727 (1982). Plaintiff has failed to state sufficient facts to state a cause of action for injunctive relief from the "unwarranted invasion" of his rights.

Accordingly, defendant's motion for summary judgment should be, and it is hereby, granted.

IT IS SO ORDERED this 30th day of October, 1986.

GEORGE HOWARD, JR.
UNITED STATES DISTRICT JUDGE